IN THE UNITED STATES COURT OF APPEALS

IN AND FOR THE NINTH CIRCUIT

HAROLD JACKSON, Appellant, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Appellee	No. 19052

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court, for the Northern District of California, Northern Division, entered on May 9, 1963, dismissing the petition for writ of habeas corpus and denying an application for the appointment of counsel to represent the appellant.

On May 17, 1963, appellant filed a motion for a certificate of probable cause. This was denied by the District Judge on May 22, 1963, on the ground that the proposed appeal was without merit and was not taken in good faith.

On June 5, 1963, appellant requested from this Court a certificate of probable cause. By its order of

December 18, 1963, this Court granted the certificate of probable cause. The jurisdiction of this Court was invoked pursuant to the provisions of Title 28, U.S.C., section 2253.

STATEMENT OF THE CASE

The Grand Jury of the City and County of San Francisco by Indictment Number 49780 charged the defendants, Harold Jackson and Joseph Lear, with kidnaping for ransom and reward one Leonard Moskovitz, who was subjected by said defendants to bodily harm (Pen. Code § 209). Both defendants were further charged with conspiring to commit the crime of kidnaping for ransom and reward (Pen. Code § 182). Also it was alleged that at the time of the commission of said offenses both defendants were armed with a deadly weapon. Appellant Jackson was charged with a prior felony (*CT 2:4-6:20).

On February 1, 1954, the defendants were arraigned (CT 7:16).

On February 9, 1954, defendant Lear interposed a motion to quash (CT 8:3). Appellant Jackson interposed the same motion to quash on February 11, 1954. Both motions were denied (CT 8:18). The defendants then entered pleas of not guilty (CT 10:14). Defendant Lear entered a motion

*"CT" refers to Clerk's Transcript in People v. Jackson, 44 Cal.2d 511, 282 P.2d 898.

for a continuance to April 5, 1954, which was denied by the court (CT 11:1).

Trial began on March 23, 1954 (CT 11:7).

On May 6, 1954, the jury found defendants guilty on both counts, and further found that Leonard Moskovitz was subjected to bodily harm and that defendants were armed with a deadly weapon at the time of the commission of the offenses. It was also held that appellant Jackson had previously been convicted of a felony (CT 148:3-150:20).

The defendants made a motion for a new trial and motion in arrest of judgment (CT 15:1-4) which were denied by the court (CT 153:1).

On June 8, 1954, notice of appeal was filed by defendant Lear (CT 156:1).

The appeal of appellant Jackson was automatic, as the death penalty was imposed against him (Cal. Pen. Code § 1239). On that appeal the following contentions were raised by the appellant:

1. That the court erred in its instruction with respect to "bodily harm".

2. That the district attorney was guilty of prejudicial misconduct in his argument to the jury.

3. That the court was guilty of error in questioning a defense witness.

4. That the court was guilty of error in impugning the good faith of counsel to the prejudice of

the appellant.

5. That error was committed by allowing evidence of other crimes.

6. That error was committed by allowing into evidence certain statements of the appellant.

7. That error resulted from the cross-examination of the appellant.

The judgment upon all counts of the indictment was reversed with directions to the trial court to impose upon each defendant a sentence of life imprisonment for the crime of kidnaping for the purpose of ransom. The orders denying the defendants' motion for new trial were affirmed (People v. Jackson, 44 Cal.2d 511, 282 P.2d 898). Petitions for a rehearing were denied on May 25, 1955. No attempt was made to obtain certiorari from the United States Supreme Court. On July 22, 1955, a new judgment was entered in accordance with the order of the California Supreme Court.

On November 21, 1961, the appellant filed a petition for a writ of habeas corpus with the California Supreme Court, Crim. No. 7032 on the records of that court. In that petition he alleged: he was denied his right to a fair and impartial trial, and deprived of due process of law, because of the trial judge's and the district attorney's misconduct and by the admission of evidence of other

crimes and statements of the appellant relating to homosexual relations which existed between appellant and the victim. That petition was denied on December 19, 1961. A petition for rehearing was denied on January 17, 1962. On February 6, 1962, the appellant filed a petition for writ of certiorari from the United States Supreme Court to review the California Supreme Court's denial of his petition for habeas corpus. A response was requested by and filed with the Court. Certiorari was denied on June 25, 1952 (Jackson v. California, 370 U.S. 964, 8 L.Ed.2d 830, 82 S.Ct. 1591).

On August 8, 1962, appellant filed the instant petition for writ of habeas corpus in the United States District Court, for the Northern District of California, Northern Division, Number 8573 on the files of said court. In that petition it was asserted that appellant herein had been denied his rights under the Fourteenth Amendment of the United States Constitution, in that the misconduct of the trial judge and the district attorney during the trial deprived him of a fair trial.

On November 15, 1962, an order to show cause was issued.

On December 6, 1962, the respondent Warden made his return and motion to dismiss and lodged with the District Court the records of appellant's previous legal actions in the State and Federal courts.

On May 9, 1963, the District Judge issued his order dismissing the petition. In granting the motion to dismiss, the District Court held that although the conduct of the trial judge and the district attorney was not to be condoned, and could certainly stand independently to sustain a reversal and the granting of a new trial, the conduct was not so gross, in considering the record as a whole, as to rise to constitutional proportions. The court stated that certainly the remarks, considering the whole record and length of the trial (the trial lasted from March 29, 1954, to May 4, 1954) were not sufficient to move a federal court to hold over the judgment of the state supreme court that the trial was unfair to the point of violating the Fourteenth Amendment to the Constitution of the United States or in violation of any other section of that document.

Further, the District Court pointed out the record contains the account of many demonstrations, contemptuous conduct, vulgarity, and disrespect for the law and the court on the part of appellant. The case hinged on the credibility of the victim as opposed to the credibility of appellant. When appellant denied his own mother and brother (the brother appeared in court for visual identification and similarity, and testimony as to appellant's true identity), his testimony was shown to be completely untrustworthy in this regard (as well as other points throughout the trial),

and the jury had a clear course. The ill-considered remarks by the court and the prosecutor could add very little to the inevitability of a judgment of conviction brought about by appellant's own conduct. The principal complaint of appellant to the trial judge's remarks were associated with the death penalty. The Supreme Court of California has, however, reversed the death penalty, thus eliminating the prejudicial sting of those remarks. What is left is hardly more than what might well be expected from a prolonged, heated and tense trial, especially in view of appellant's deportment therein.

On May 17, 1963, appellant sought a certificate of probable cause from the District Court. On May 22, 1963, that court denied it on the grounds that the proposed appeal was without merit and not taken in good faith.

On June 5, 1963, appellant addressed to this Court a motion to proceed in forma pauperis for a certificate of probable cause and for the appointment of counsel. This Court by its order of December 18, 1963, granted the certificate of probable cause.

THE ALLEGATIONS OF THE PETITION

The appellant in his petition alleged the following:

1. That the California Supreme Court sanctioned the denial of a fair trial by the use of Article 6, section 4½ of the California Constitution.

2. That Article 6, section 4½, of the California Constitution is unconstitutional.

3. That the denial by the Supreme Court of the State of California of a petition for habeas corpus without a hearing, without an opinion, without taking testimony, and requiring respondents to answer, was a denial of procedural due process of law.

4. That appellant was denied due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

THE RETURN

The return to the order to show cause and motion to dismiss set forth the judgment under which appellant was held, that is, kidnaping for ransom and reward in violation of California Penal Code section 209. The appellee also lodged copies of the state court's records with the District Court. From these documents it appears that the appellant was indicted by the Grand Jury of the City and County of San Francisco for kidnaping for ransom and reward in violation of Penal Code section 209, and with conspiracy to commit the crime of kidnaping for ransom in violation of Penal Code section 182.

Appellant entered his pleas of not guilty to each count and the trial began on March 23, 1954 (CT 11). At that trial the following facts were established, as is

reflected by the Reporter's Transcript of the trial lodged with the United States District Court.

STATEMENT OF FACTS

In 1939 or 1940 Jackson and Lear met for the first time while both were employed by the Prather Detective Agency (*RT 1366). They renewed their acquaintanceship again in 1953 (RT 1376:20). After a short time, Jackson - according to Lear - asked Lear to work on a case for him (RT 1379:1), but never told him that it was to be a kidnaping (RT 1386:5). Jackson, however, testified that he had discussed the kidnaping with Lear (RT 986:1). He stated he told Lear that the latter would receive $50,000 for his part in the kidnaping (RT 989:7) and Lear agreed to go through with it (RT 990:14).

On January 6, 1954, Ed Shapiro was contacted by Jackson (RT 799:17) and told either to pay the latter $600 or he would release information as to Shapiro's past record (RT 812-814). As Shapiro was then being tried before the federal court for income tax evasion, he paid the money out of fear of disclosure (RT 817:4). Jackson claims he received $1250 from Mr. Shapiro (RT 1002:14), but that it was paid to investigate the jury in the Shapiro case (RT 1003:7). He did not perform this duty (RT 1003:14). Also, it might be pointed out that at that time the jury had already been

*"RT" refers to Reporter's Transcript in People v. Jackson, 44 Cal.2d 511, 282 P.2d 898

sworn (RT 1004:7).

On this same day - January 6 - Jackson claimed that he saw Leonard Moskovitz (henceforth referred to as Leonard), at about 2 p.m. at the City Hall (RT 995:23-996:7). Leonard did not see him on that date (RT 1836:13), for on that day he was a pallbearer (RT 1845:16).

On Monday, January 11 (RT 1005:18) or Tuesday, January 12, 1954, (RT 1386:8), Jackson and Lear came to San Francisco.

On Wednesday morning (RT 1416:16) Jackson and Lear drove to San Jose (RT 1409:17); Jackson had a list of items and sent Lear in to purchase them. They purchased two lengths of chain (RT 1410:25), two pieces of pipe (RT 1411:1-16), two wrenches (RT 1414:13), two pairs of rubber gloves (RT 1415:1), a blanket (RT 1415:10), and nuts and bolts (RT 1414:2). On Wednesday morning Lear's car was exchanged for one that was less conspicuous (RT 1420:19).

At about 3 p.m. (RT 1853:15) on Wednesday, January 13, Jackson went to Leonard's office. He introduced himself as "Mr. Lund" (RT 81:8), and informed Leonard that he wanted to purchase a home in a high-class district (RT 80:11). A particular home was suggested which Jackson said he would look at (RT 80:16), and at which he did look (RT 1015:6). Later that day Jackson called to make an appointment with Leonard to see the

house on the following Saturday (RT 81:3). Jackson claimed that this meeting took place at about 1:15 p.m. (RT 1012:21). Leonard was attending a Golden Gate Exchange Club luncheon at the Fairmont Hotel at that time (RT 1839:11) and remained there until about 2:15 p.m. (RT 1842:1; 1890:2-1891:6; 1893:19-1894:24; 1896:7-1897:14; 1902:14-24; 1943:12-1945:7). Jackson claimed that about 2:10 p.m. (RT 1012:21; 1014:21, 1015:12; 1016:3) he met Leonard at 16th and Geary (RT 1016:5), and they went to the Beach and ate (RT 1016:8-14), arriving there at about three o'clock (RT 1270:21). At this time Leonard was supposed to have been wearing a sports shirt (RT 1272:12), but that afternoon he was wearing a white shirt and tie (RT 1844:26), at least while at the luncheon (RT 1891:7; 1897:15; 1903:2; 1946:17).

A defense witness, Mrs. Opal Barnes, testified that she served Jackson and Leonard at the Pie Shop at the Beach at about 3:00 o'clock on January 13 (RT 1288:15-1293:21). But, on a previous occasion she stated that she had never served Jackson and Leonard (RT 2037:17). According to Mrs. Barnes, Leonard was wearing a sports shirt at that time (RT 1290:7). As already pointed out, Leonard was not wearing a sports shirt that day. Certain parts of the testimony of this witness are of particular interest. Although she merely served them and did not

converse with them (RT 1291:10), she remembered that they had apple turnovers and coffee (RT 1291:17), how Jackson and Leonard were dressed (RT 1316:26-1317:8), and - in particular - she was able to describe the plaid of Leonard's shirt in detail (RT 1331:24-1332:22), that they went to their car which was parked in the center of the street, and there ate this food (RT 1291:25). Consider also, that Mrs. Barnes could not identify Mr. Lear (RT 1309:4), although Mr. Lear frequently ate at the Pie Shop (RT 1606:22; 1607:2). The explanation is simple, Leonard was not there that afternoon (RT 1837:14).

Jackson testified that he talked to Leonard for about two hours on that Wednesday afternoon which would have been until after five o'clock (RT 1020:16). But, at around four that afternoon Jackson was at 175 Arbor Street (RT 1794:17).

At this time Lear is supposed to have given Jackson a list of items which he was to purchase for use in the kidnaping (RT 1016:17), but Lear said these items were purchased Wednesday morning. Jackson himself said that they were purchased on the morning the down payment on the house was made (RT 1021:20) which was Wednesday (RT 1789:19).

On one night that week, Jackson and Lear, in furtherance of their conspiracy, went to the Southern

Pacific Depot to determine if a person could stand on the back platform of the Starlight (RT 1258:10). Lear told some railroad official that he wanted to take pictures from that platform and wondered if he could stay on it during the trip (RT 1259:4; 1933:3).

One evening Jackson rode the Starlight to San Jose in order to determine if a person could ride on the platform, which he was allowed to do (RT 1022:4-20). Lear met Jackson in San Jose that night and they returned to San Francisco (RT 1022:21).

On Friday night, Lear was sent to a prearranged spot south of Sunnyvale, while Jackson took the Starlight again (RT 1023:21). Jackson rode on the platform of the train and, when Lear signaled, dropped a bundle of newspapers off the train (RT 1024:2-24). This was to test their plan for obtaining the ransom.

Saturday morning Lear took Jackson to the City Hall (RT 1422:7) from where he made a telephone call to Leonard (RT 1025:14) and told him he desired to look at the house that morning (RT 81:16). Plans were made for Leonard to pick up Jackson at the City Hall about 11 a.m. (RT 82:25), which he did (RT 86:10). Jackson then asked Leonard to pick up his wife and to meet his brother at the latter's home (RT 86:18). Leonard drove to Arbor Street, as directed by Jackson. Jackson told Leonard to park the car a short distance away from 167 Arbor Street, which

was their destination (RT 88:13). They then went to the front door of the house, Jackson being careful to stay behind Leonard (RT 88:23). The door was opened, but by whom Leonard was uncertain, for the person stepped behind the door. Once inside, Jackson pushed Leonard onto the couch and grabbed his arms (RT 89:9). Lear rushed at Leonard with a knife which he held against his throat, saying, "One peep out of you and you are dead" (RT 91:3; 92:4). Leonard attempted to rise, but Jackson held him down (RT 94:9), cautioning him to behave and he "won't be hurt" (RT 94:18). Lear then said, "I have got this knife and I am ready to use it" (RT 94:20). Jackson then armed himself with a piece of pipe (RT 94:21) which he held over Leonard's head while Lear procured some chains (RT 95:19) which he put around Leonard's ankles and wrists (RT 97:3) and fastened as tightly as possible (RT 100:6; 101:14) with nuts and bolts (RT 97:12). Leonard's watch (RT 102:33), wallet and papers (RT 112:7), and the keys to his car (RT 117:10) were taken. Leonard pleaded to be freed and asked Lear to think of his (Leonard's) wife and children (RT 116:8). Lear retorted by telling him to "cut out the bullshit" (RT 116:18). Jackson, on discovering that there was little money in the wallet, was extremely disappointed and complained bitterly (RT 116:20). The contents of the wallet were destroyed (RT 117:24).

At this time, Jackson told Leonard that he had been kidnaped and was being held for $500,000 ransom by a gang of five, and, further, that he was to write a ransom note; with that, Lear went and got a pad upon which to write the letter (RT 118:5). A coffee table was moved over to the couch where Leonard was sitting and Lear dictated the first ransom note (RT 120:25) from a piece of paper which he had (RT 120:21; 122:1). Before this letter was written, and while it was being written, Jackson informed Leonard that they had orders to kill him if he made the slightest attempt to escape (RT 121:8).

That first ransom note informed Leonard's father that he was being held for $500,000 ransom and would be killed if it was not paid. It informed him of how contact was to be made through the newspapers and the denominations in which the money was to be paid. There was also included in the letter a drawing of a suitcase, which Lear helped finish (RT 124:2-4). All of this time Lear was wearing rubber gloves (RT 127:1).

Leonard was then forced to hobble into the bedroom and to lie down on the bed (RT 128:26). Lear warned him that he could hit a bull's eye at forty paces with a knife, so not to attempt an escape. Further, Jackson pointed out that even if he got out of the house there were three other members of the gang outside who would get him (RT 128:15).

Lear left the bedroom and, when he returned, had some adhesive tape and ear plugs (RT 129:9). The ear plugs and toilet tissue were put in Leonard's ears which were then taped (RT 129:20). A large piece of tape was also placed over his mouth (RT 129:23). Lear tied him to the bed (RT 129:26), while Jackson stood guard over him with the lead pipe, telling him that if he attempted to resist, his skull would be crushed (RT 130:22). Saucers containing the adhesive roll and cover were balanced on Leonard's knees, so that if he moved they would rattle and alert his kidnapers (RT 133:24). Jackson warned that any outcry would result in death (RT 133:17). Two bureaus with mirrors were arranged in such a way that anyone in the living room could see any move made by Leonard (RT 134:9-135:7).

Jackson then left the house and was gone for two to three hours (RT 1435:4). During that time he took Leonard's car to the Rincon Annex where he mailed the ransom note (RT 1036:8). From there he took the car to Union Square Garage where he left it (RT 1036:12). This was only one of three occasions on which Jackson left Lear and Leonard alone (RT 1695:18). This ransom letter was received by Leonard's father that afternoon (RT 19:23).

Leonard remained tied to the bed all Saturday afternoon (RT 144:3); all of that time he was under constant surveillance by Lear and Jackson (RT 144:9). At one time that afternoon when the doorbell rang, Lear rushed in

and put a pillow over Leonard's ears and threatened to crush his skull if he made any outcry (RT 144:16).

When it was beginning to get dark, Leonard was taken into the living room (RT 145:25) by Lear, who was armed with a knife, and Jackson, who was carrying a piece of pipe (RT 147:8). Leonard was chained to the dining room table (RT 147:20). Again, Leonard was warned against attempting to escape and reminded of the rest of the gang (RT 148:15). He was then fed some beans, coffee, and a cookie (RT 149:20). All three listened for news of the kidnaping, and when none was forthcoming they said that so far he was very lucky. All this time neither Lear nor Jackson showed any tenseness or nervousness (RT 150:6).

About ten o'clock Jackson got a mattress which he threw on the living room floor (RT 150:15). Lear tied Leonard to it (RT 151:13) in a spread-eagle fashion (RT 150:23). Leonard did not sleep that night because of his fear (RT 152:24). During the night Jackson and Lear took turns guarding him (RT 153:3). He remained thus bound throughout that night (RT 151:25).

Sunday morning, Leonard wrote a second ransom note while still on the mattress (RT 155:9). Mr. Lear dictated this letter from a piece of paper he had in his hand (RT 155:23). This letter was a general plea to Leonard's father to comply with the kidnapers' wishes (RT 157:14-158:18). At Lear's direction (RT 157:2), an

envelope was addressed to Leonard's father (RT 158:22), and, again at Lear's direction, the letter was placed in the envelope and sealed (RT 159:2). Again Lear wore rubber gloves (RT 159:11). This letter was received by Leonard's father (RT 22:21-23:11).

After breakfast Leonard was again taken to the bedroom (RT 159:16), placed on the bed, and again lashed to it, gagged, and his ears stuffed (RT 161:6-23). Leonard remained on the bed until early afternoon (RT 163:6). He was then taken to the dining room, chained to the table, and given something to eat (RT 165:13). After this lunch Leonard was returned to the bed and tied as before (RT 166:10). That afternoon Lear went out of the house and purchased a newspaper (RT 1443:9). This was one of at least five trips which Lear made out of the house alone (RT 1443:25). After dark Lear and Jackson awakened Leonard and showed him the ad in the Examiner notifying them of his father's inability to raise the ransom. They were quite angry when they heard that the money could not be raised (RT 167:1).

Leonard was then told to write a third letter in which the ransom would be reduced to $300,000. Again, Lear dictated this letter (RT 172:26). The letter begged Leonard's father to raise $300,000 immediately, warning that otherwise they would kill their victim. It also informed him that already some of them wanted to "send you

my testicles to put pressure on you" (RT 173:22-174:15). Leonard's father received this letter (RT 23:21-24:7). Jackson and Lear did not stop with one letter. Leonard was told that the boss wanted him to write a number of letters at that time (RT 171), which Lear then dictated (RT 176:24).

The next letter told in detail how the ransom was to be dropped from the back of the Starlight when a signal was given with green-and-red lights (RT 177:12-178:6). This letter was written in duplicate (RT 178:8). Envelopes for these letters were also then addressed by Leonard (RT 179:1).

At this time Leonard protested that the plan was too complicated and his father would become confused, but, further, his father, because of ill health (RT 179:12), could not make the trip. Jackson said, "Never mind, this plan has been tested and it is foolproof" (RT 180:19), but Lear expressed misgivings.

Still another letter was written. It directed the father to return to San Francisco if he failed to see the signals on the trip down (RT 181:1-183:23). Lear dictated this letter (RT 184:23).

Leonard, at this time, began to attempt to sell the idea - at least to Lear - that this plan was too complex, with the hope that by so doing he would be allowed to remain alive (RT 181:10).

Still another letter was written. It dealt with the details of Leonard's release (RT 185:10). Lear dictated this letter (RT 186:12). These letters were not dated (RT 186:22).

Leonard was then given dinner (RT 188:17), after which he was again tied to the mattress (RT 190:7). Lear and Jackson that night stood guard, alternately, as on the previous night (RT 191:12).

Monday morning Leonard was released from the mattress by Jackson (RT 192:7) and taken to the table (RT 192:24). Leonard then planted the idea in Lear's mind that some arrangement could be made for the transfer of money through Leonard's brother (RT 193:4). He kept repeating this new idea to Lear (RT 195:6) until he was put back in the bedroom (RT 195:17). He remained lashed to the bed until he was again given some food (RT 186:3) and then returned to the bed (RT 197:16), and remained there until dark (RT 198:8).

At about noon on that Monday, Lear left the house and called the Moskovitz Realty Office (RT 1451:20) from downtown (RT 1451:26). Leonard's brother, Alfred, received this call (RT 466:13). He was told by Lear to raise $300,000 by the next night (RT 467:4).

That evening Leonard was taken to the dining room and shown an Examiner (RT 199:8), which contained an ad informing them that the money was ready (RT 199:17).

But Jackson warned that Leonard was still in danger of losing his life (RT 200:3). This prompted Leonard to suggest another plan for obtaining the ransom (RT 201:23). Leonard was then fed, but was too nervous to eat, so he just kept talking of his plan (RT 202:21). Lear thought that the offered plan was good (RT 203:7). Leonard was then sent to the bedroom; he was not chained, but he was threatened and warned not to attempt to escape, for the gang was still present and he was under constant surveillance (RT 203:16). Lear and Jackson then engaged in a heated discussion (RT 204:13); indeed, they became abusive with one another (RT 1682).

Then Lear and Jackson told Leonard that they were going to allow him to telephone his brother. He was taken to the car and forced to lie down on the back floor (RT 206:4) of the two-door sedan (RT 207:13). After they had gone a few blocks, Leonard was allowed to sit up (RT 207:19). Jackson warned him not to try anything, as he had a rod with him (RT 209:4). Leonard saw some object in Jackson's belt that he thought was a gun (RT 209:14). Finally they stopped at a telephone booth on Portola Drive (RT 208:22). Lear and Leonard went to the booth (RT 209:21). Lear was armed with his knife and Jackson said that he would keep the door open so that if Leonard attempted a break he could shoot him (RT 209:16).

Leonard called his brother's office (RT 209:24)

and spoke to him. All of this time Lear was listening to the entire conversation (RT 211:11). After Leonard answered a number of questions to identify himself and asked if Alfred had the money (RT 212:11), Lear took over the conversation (RT 212:25) and said that he would call Alfred back later (RT 213:7). They returned to the car (RT 213:17). Jackson was in a rage because they had talked for so long (RT 213:20). Lear just told him to "take it easy" (RT 213:25). Again Leonard was forced to lie on the floor (RT 214:7) and they returned to the house. All three went into the dining room (RT 214:25) where Lear asked Leonard what his plan was for the payment of the money. Leonard, on the spur of the moment, attempted to think of some plan (RT 215:10). He attempted to convince his kidnapers that his brother would hand over the money to them (RT 215:23). Lear told him not to forget that there were others in the gang and that if Leonard slipped he could expect a bomb thrown through his window which would injure his children (RT 217:14).

During one of these conversations, Lear asked Leonard if the latter would be willing to rendezvous with him and give him (Lear) his (Lear's) share of the ransom (RT 1549:2; 1555:5; 1728:21-1729:4; 1851:13). In fact, Lear said, "I am willing to take $50,000" (RT 1877:18). Lear claims now that he was not really interested in his

share of the ransom (RT 1555:20), but merely asked for it so, "In the eyes of Mr. Jackson I would not have looked like a fool offering to walk out without anything. I was trying to get out of it as sensibly as I possibly could, and get Lennie out of it too."

Jackson told Leonard that even now he "might still be killed" (RT 218:18).

Jackson then told Leonard to return to the bedroom, but didn't chain him because he believed that by now Leonard had been warned sufficiently against attempting any escape (RT 220:20). Jackson paced back and forth between the bedroom and the hall (RT 221:1). After some time, Jackson muttered, "Where is that guy? He should have been back-" and then, "This whole plan is crazy! He should have left us stick by the other" (RT 221:23).

After the conversation about the new plan, Lear left the house and again called Leonard's brother, Alfred, at about 2:30 a.m. on Tuesday, January 19 (RT 472:13-473:6). Lear first asked if the phone was tapped (RT 476:3). He then inquired as to the bank used, how long it would take to get the money (RT 477), and was told that the money would be ready by 11:30 a.m. that day, and was assured that the money would not be marked but would be in old bills. Lear then said that some one was coming, and he would have to call back (RT 478) tomorrow.

Lear was seen by two police officers while he was

making this call (RT 540:2). When the car stopped (RT 540:10), Inspector Nelder ran across the curb and grabbed the telephone out of Lear's hand (RT 492:19), and checked as to where the call was being made. When it was discovered that the call was to the Moskovitz family, Lear was arrested (RT 493:4).

At first, Lear denied any knowledge of the kidnaping (RT 495:4), but finally broke down and told the police the address where Jackson was holding Leonard (RT 497:11), but he warned them "not to miss" for "that part in the letter about cutting him up is no joke" (RT 498:8). Police reinforcements were requested (RT 499:11). Lear described the house, and informed the police that with his help they could get Jackson (RT 499:22). Lear then made an outline of the house (RT 500:1). In the meantime, the other police had arrived (RT 501:5). Lear and one of the officers left the group of officers who were approaching the house and entered the garage. Lear knocked at the back door, which Jackson opened; as he did, the officer lunged forward and captured him.

Lear said that there were no guns in the house, but that Leonard thought they were armed (RT 501:19-502:19). Lear had in his possession at the time of his arrest Leonard's wallet and a letter (RT 502:20 which contained instructions for Alfred, Leonard's brother, on

how to deliver the ransom money (RT 507:2-21).

When Leonard heard the commotion caused by the entry of the police he jumped off the bed and ran into the closet (RT 222:11), for he thought it was "the gang" coming to kill him (RT 288:3). When he heard the men who were running throughout the house yell, "Lennie, Lennie" he emerged from the closet, asking, "Are you part of the gang or are you policemen?" (RT 222:24). At the time of his release, Leonard's wrists had marks on them which showed that they had been chained (RT 629:7).

During the time Leonard was held prisoner, Jackson and Lear were very friendly toward each other (RT 1850:24), and neither one appeared to be in fear of the other (RT 1850:26-1851:3); nor did one seem to dominate the other (RT 1851:4).

After his arrest, Lear informed the police in detail of all that had transpired (RT 640:6-691:18). In substance, this statement is a reiteration of all of the facts above enumerated. He admitted: that he chained Leonard (RT 650); that Leonard was ordered to write a ransom note (RT 651:10); that Leonard was then lashed to the bed (RT 661:14) with his ears stuffed and taped and his mouth taped shut (RT 662:11); also saucers with the adhesive containers were balanced on his knees (RT 663:15); that he threatened Leonard with a knife and warned him to go along with them - "or else" (RT 666:6); that Jackson

took Leonard's car to Union Square and left it there after mailing the first ransom demand (RT 667:13); that Leonard was tied to a mattress (RT 668:12) in a spread-eagle fashion (RT 669:5) and left that way all of Saturday night (RT 669:10); that Sunday, Leonard was shackled and lashed in bed (RT 669:14); that Leonard wrote a second ransom note on Sunday which Lear dictated (RT 670:1); that the drafting of these notes was a joint undertaking of Jackson's and Lear's (RT 671:11); that on Sunday night Leonard was forced to write several ransom notes (RT 672:8); that he called Leonard's brother (RT 678:1) and said that $300,000 would be considered as ransom rather than $500,000 (RT 678:10); that he constantly carried a piece of pipe to impress Leonard and to fill him with fear (RT 678:18); that Jackson gave way to Lear with regard to the plan for the receipt of the ransom (RT 679:5); that Leonard was always chained until they took him out on Monday night to make the telephone call (RT 680:19).

Jackson also made a statement on the day of his arrest (RT 692:8); when told of Lear's statement, he said that it was partly true (RT 695). He did deny mailing the ransom note (RT 697:15).

Lear was then brought in and questioned in Jackson's presence (RT 698:10). Lear was again asked about the purchase of the items used in the kidnaping, about the

ransom notes (RT 700); Jackson denied that he had Lear purchase these items (RT 701:7), but made no comment with regard to the other statements (RT 701:16). Jackson, when asked if he wanted to tell the truth, retorted, "Do you want me to be a stoolpigeon like he is?" (RT 702:1).

During this questioning, Jackson would not admit any complicity in the transaction (RT 702:3). He did say that Leonard had never been chained (RT 702:11). He denied that he ever mailed any of the ransom notes (RT 702:21).

Late at night, Tuesday, the 19th, Lear and Jackson were taken to 167 Arbor Street to re-enact the tying and shackling of Leonard (RT 706:5). Leonard and Jackson showed how they had entered (RT 726:12). Leonard said that Jackson had told him to sit down on the chesterfield; Lear said that this was true (RT 727:12); Jackson was silent (RT 727:17). The taking of the wallet was admitted by Lear (RT 728:9); but Jackson denied that he had taken the wallet (728:12). Lear repeated Jackson's statement to the effect that it was like a Jew not to have any money on him (RT 728:17). Jackson denied this statement (RT 729:1). Lear put the chains on Leonard as he said he had at Jackson's command (RT 729:23). Jackson remained silent (RT 730:9). Lear stated that Leonard wrote the ransom note dictated by Lear from a letter prepared by Jackson (RT 734:9); Jackson said nothing (RT 734:25). Lear tied Leonard to the bed in exactly the same manner that he was tied while he was held

prisoner (RT 736:2); Jackson said nothing (RT 744:13); Lear tied Leonard to the mattress as he had during the kidnaping (RT 751:14); Jackson did not deny the charge that he and Lear had thus tied Leonard (RT 751:22).

After his arrest, Lear wrote to Leonard and his family, stating that he regretted what had happened and expressing his belief that Leonard was one of the "gamest little guys," for Lear knew what he had gone through, as he himself had been in fear of reprisal on his own wife and child (RT 1715:5).

Throughout the trial Lear claimed that he acted out of fear that Jackson would take his life (RT 1718:2), although Lear was often armed, himself, at the house (RT 1718:19-24). Also, he admitted that on five or six occasions he had gone out, leaving Jackson to guard Leonard at the house (RT 1443:25). Then, on three occasions Jackson had left the house (RT 1695:18) - on one occasion for two or three hours (RT 1435:4). Nor had Lear shown any tenseness or nervousness during the kidnaping (RT 150:6). Also, consider that Lear and Jackson seemed to be very friendly throughout the kidnaping (RT 1850:24) and Lear at no time appeared to fear Jackson (RT 1850:26).

Jackson admitted the kidnaping, but asserted that Leonard planned this entire thing because he was

heavily in debt. The facts show that such was not the case. The records of Dun & Bradstreet show that Alfred and his brother had a net worth of $80,600 (RT 2278:18-2280:26). Leonard's standing with the Professional Conduct Committee of the San Francisco Real Estate Board and of the Multiple Listing Service was excellent (RT 2206:5). So excellent was his financial situation that Leonard and his brother could borrow $10,000 and $15,000 on an unsecured loan (RT 2233:12). Indeed, his business had been expanding in 1953 (RT 2267).

The following evidence is only a part of that which went to prove that Jackson was Hans Anderson, and thus guilty of prior felony with which he was charged.

1. He was identified by his brother, Peter Anderson, as Hans Anderson (RT 2147:3-23);

2. He was identified by a former fellow inmate at San Quentin (RT 789:10-791:19);

3. Jackson's handwriting and that of Anderson are identical (RT 2098:9);

4. The fingerprints of Jackson and Anderson are identical (RT 2050:12);

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5. Consider also the similarity of tattoos:

ANDERSON:

Right forearm: Outer arm

a. Sailor girl in Anchor

b. Red rose

(RT 1105:17; 1911:21-1912:21)

Inner arm

Three-masted ship

Left forearm:

Butterfly girl

(RT 1912:24)

JACKSON

Right forearm: Outer arm

a. Sailor girl and anchor

(RT 1100:11; 1101:8)

b. Rose

(RT 1100:19)

Inner arm

Three-masted ship

(RT 1099:24; 1101:6; 1279:24)

Left forearm

Woman with colored wings (RT 1106:3-16; 1280:10)

SUMMARY OF THE ARGUMENT

Appellee contends that the action of the District Court in dismissing the petition was proper, for viewed in the light of the state court record, no substantial federal question was presented to the District Court, and hence there was neither a necessity for a hearing nor appointing counsel for appellant.

ARGUMENT

I HABEAS CORPUS DOES NOT LIE TO RELITIGATE QUESTIONS WHICH HAVE BEEN RAISED AND DETERMINED ON A DIRECT APPEAL

It is established that habeas corpus may not be used either in the state or the federal court to raise questions which could and should have been, or were in fact, raised on appeal, for habeas corpus cannot be used as a second appeal (In re Bine, 47 Cal.2d 814, 817, 306 P.2d 445; In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513; In re Manchester, 33 Cal.2d 740, 742, 204 P.2d 881) and federal law (Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469; Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982; In re Winchester, 53 Cal.2d 528, 532, 348 P.2d. 904).

Thus it has been held that habeas corpus will not lie to review rulings of the trial court with respect to the admission or exclusion of evidence or to correct mere errors of procedure occurring at the trial or to review errors committed within the exercise of an admitted

jurisdiction (In re Winchester, 53 Cal.2d 528, 532, 348 P.2d 904; In re Lindley, 29 Cal.2d 709, 723, 177 P.2d 918; In re Porterfield, 28 Cal.2d 91, 99, 168 P.2d 706, 167 A.L.R. 675; Schechter v. Waters, 199 F.2d 318).

It is apparent that all of the alleged grounds now presented by the appellant were presented on an appeal to the California Supreme Court and were there ruled upon. What appellant attempts to do now is to obtain a second appellate review of such grounds. Such action cannot be tolerated.

II APPELLANT HAS FAILED TO EXHAUST HIS STATE REMEDIES

As this Court recently held in Rose v. Dickson, No. 18670, the question of whether there has been an exhaustion of state remedies is one of law, which this Court may pass upon.

Under California law it is required that an application for a petition for writ of habeas corpus allege with particularity the facts upon which the petitioner would have a final judgment overturned and further that he fully disclose his reasons for delaying in the presentation of these facts (People v. Berry, 43 Cal.2d 838, 279 P.2d 18; In re Swain, 34 Cal.2d 300, 209 P.2d 793; People v. Nor Woods, 154 Cal.App.2d 589, 316 P.2d 1010).

In his petition for habeas corpus to the

California Supreme Court the appellant attempted to justify his delay by asserting that during the time since his conviction on April 28, 1955, he has been corresponding with various attorneys and with the court of last resort. This is not sufficient justification for the protracted delay here shown. For this reason appellant has failed to meet the procedural requirements of California, and in so doing he has failed to exhaust his state remedies and is for that reason prevented from presenting the questions which he now attempts to present to this Court (Fay v. Noia, 9 L.Ed.2d 837, 371 U.S. 391, 83 S.Ct. 822; Carter v. Illinois, 329 U.S. 173, 176, 67 S.Ct. 216, 91 L.Ed. 172, 175; Irvin v. Dowd, 359 U.S. 200, 3 L.Ed. 900, 907, 79 S.Ct. 825; Darr v. Burford, 339 U.S. 200, 210-214, 94 L.Ed. 761, 770-772, 70 S.Ct. 587).

III BY THE FAILURE TO SEASONABLY RAISE THE FEDERAL QUESTION, APPELLANT HAS WAIVED ANY RIGHT TO DO SO

It is now established that a defendant forfeits his constitutional right by the failure to make timely assertion of that right (Michel v. Louisiana, 350 U.S. 91, 99, 76 S.Ct. 158, 100 L.Ed. 83, 92; Edelman v. California, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387; Jennings v. Illinois, 342 U.S. 104, 72 S.Ct. 123, 96 L.Ed. 119; Brown v. Allen, 344 U.S. 443, 480, 73 S.Ct. 397, 97 L.Ed.469, 501).

It is patent from the records in this case that the alleged action here involved was well known to the appellant

at the time of trial and appeal in 1954 and 1955. Neither he nor his counsel saw fit to petition the United States Supreme Court for certiorari from the affirmance of his judgment nor to take any other action to protect that right. Indeed, it would appear that the first time that the question of the violation of his federal rights was raised was when he filed his petition for habeas corpus with the California Supreme Court in December, 1961.

A defendant and his counsel cannot neglect known objections to the proceeding on federal constitutional grounds for later use in a collateral attack on the judgment (Brown v. Allen, 344 U.S. 443, 480, 73 S.Ct.397, 97 L.Ed. 469, 501).

IV ARTICLE 6, SECTION 4½ OF THE CALIFORNIA CONSTITUTION IS NOT IN CONFLICT WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Appellant has created the impression in his petition that in California a defendant is not entitled to a fair trial and the protection of the Fourteenth Amendment to the United States Constitution, if the evidence overwhelmingly establishes the defendant's guilt. Such is not, and never has been, the law in this State. The section of the California Constitution under consideration reads as follows:

"Art. VI, sec. 4 ½. No judgment shall be set aside, or new trial granted, in any case, on the

ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

This section, as first adopted in 1911, had reference only to criminal cases. It was amended in 1914 so as to also apply to civil cases. While it had long been provided in our statutory law that judgments would not be reversed because of technical errors or defects which did not affect the substantial rights of the defendant (Pen. Code §§ 1258, 1404),the courts nevertheless in reviewing convictions in criminal cases had generally followed the rule that prejudice would be presumed from error and upon that basis the defendant was "entitled to a reversal of the judgment" (People v. Williams, 18 Cal. 187, 194; see also People v. Murphy, 47 Cal.103, 106; People v. Stanley, 47 Cal. 113, 119 (17 Am.Rep.401); People v. Furtado, 57 Cal. 345, 347; People v. Sansome, 84 Cal. 449, 451, 24 P.143; People v. Moore, 103 Cal.508, 511, 37 P. 510; People v. Richards, 136 Cal. 127, 128, 68 P. 477). The constitutional amendment added a new concept calling for a determination by the court that the alleged error resulted in "a miscarriage of justice."

To this end the appellate court was required to review the evidence so as to form an "opinion" as to whether the assigned errors had affected the outcome of the case resulting in a "miscarriage of justice."

The application of this provision of the California Constitution is best explained by the California Supreme Court's statement in People v. Sarazzawski, 27 Cal.2d 7, 11, 161 P.2d 934, where the court stated the principles which have guided all the courts of this State in the application of that constitutional provision:

> "At least two of such incidents are matters of such grave moment as to amount to substantial departures from the established elements of a fair trial, to which every person charged with crime, no matter how rich or poor, virtuous or debased, is entitled. When a defendant has been denied any essential element of a fair trial or due process, even the broad saving provisions of section 4 1/2 of article VI of our state Constitution cannot remedy the vice and the judgment cannot stand. (People v. Mahoney, 201 Cal. 618, 627 [258 P. 607]; People v. Adams, 76 Cal.App. 178, 186-187 [244 P. 106]; People v. Gilliland, 39 Cal.App.2d 250, 264 [103 P.2d 179]; People v. Duvernay, 43 Cal.App.2d 823, 829 [111 P.2d 659].) That section was not designed to 'abrogate the guaranties accorded persons accused of

crime by other parts of the same constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering "justice" in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' (People v. O'Bryan, 165 Cal. 55, 65 [130 P. 1042], opinion of Mr. Justice Sloss; People v. Wilson, 23 Cal.App. 513, 524 [138 P. 971].)"

There has been a constant adherence to this interpretation (People v. Rogers, 56 Cal.2d 301, 307, 14 Cal.Rptr. 660, 363 P.2d 892; People v. Elliot, 54 Cal.2d 498, 506, 6 Cal.Rptr. 753, 354 P.2d 225; In re Winchester, 53 Cal.2d 528, 531, 2 Cal.Rptr. 296, 348 P.2d 904; People v. Dorman, 28 Cal.2d 846, 852, 172 P.2d 686; People v. Muza, 178 Cal.App.2d 901, 914, 3 Cal.Rptr. 395; People v. Hollins, 164 Cal.App.2d 191, 194, 330 P.2d 246; People v. Tucker, 164 Cal.App.2d 624, 628, 331 P.2d 160; People v. Arends, 155 Cal.App.2d 496, 510, 318 P.2d 532; People v. Musumeci, 133 Cal.App.2d 354, 365, 284 P.2d 168; People v. Robarge, 111 Cal.App.2d 87, 95, 244 P.2d 407).

As this Court pointed out in Chavez v. Dickson, 280 F.2d 727, 731, it is not the function of a federal court to review the correctness of a state court's interpretation of state law.

In People v. Cowan, 44 Cal.App.2d 155, 159, the court was called upon to determine whether or not Article 6 section 4 1/2 of the California Constitution violated the provisions of the Fourteenth Amendment to the Federal Constitution. The court pointed out that this section of our Constitution had never been construed in such a manner as to conflict with the Fourteenth Amendment.

A like conclusion was reached by the United States Court of Appeals for the Ninth Circuit in Sampsell v. People of State of California, 191 F.2d 721, 726.

In effect Article 6, section 4 1/2 of the California Constitution is, in operation, identical to Rule 52 of the Federal Rules of Criminal Procedure and section 2111 of Title 28, U.S.C.A., Judiciary and Judicial Procedure.

In all instances it is provided that a judgment will not be reversed for a mere technicality, for it is recognized that in a long and protracted trial perfection is impossible and some error will naturally creep into the record. These sections and rules provide that such errors shall not be deemed prejudicial and automatically result in a reversal. But, if such error is of such a magnitude

as to constitute a denial of due process, the saving grace of these provisions is inoperative for it is presumed that there has been a miscarriage of justice which requires a reversal.

V APPELLANT WAS NOT DENIED A FAIR AND IMPARTIAL TRIAL

On his appeal the appellant called to the attention of the California Supreme Court conduct on the part of the trial court which he considered prejudicial. That conduct was fully considered by the court and in certain instances found to constitute misconduct, but there was no finding that the trial court's conduct deprived the appellant of due process of law.

Habeas corpus will not lie in a federal court to review errors committed during a trial in a state court unless they involve jurisdiction of the court or constitute a deprivation of constitutional rights amounting to a denial of the essence of a fair trial (Smith v. United States, 187 F.2d 192, 197; Schechter v. Waters, 199 F.2d 318, 319; Sunal v. Large, 332 U.S. 174, 179, 91 L.Ed.1982, 1987; Buchalter v. New York, 319 U.S. 427, 429; Application of Lyda, 154 F.2d 237, 238; Leonard v. Hudspeth, 112 F.2d 121).

A full review of the record establishes that there was no deprivation of appellant's constitutional rights. Indeed, a review of the transcript of that trial

will reveal that the conduct of the appellant was, to say the least, shocking. He constantly demonstrated complete contempt for the court and for any orderly process of law. On several occasions he became so obnoxious that it became necessary to cite him for contempt (RT 2143:16 to 2147:11). His insolent conduct and vulgarity during his cross-examination is unbelievable (RT 1064:11 to 1217:18; RT 2138:19 to 2143:14).

VI THE DISTRICT COURT PROPERLY REFUSED TO GRANT A HEARING

The United States Supreme Court in Townsend v. Sain, 83 S.Ct. 745, held that a hearing was not required if the applicant had received a full and fair evidentiary hearing in the state court either at the time of trial or in a collateral proceeding. As the appellant's points relate solely to the conduct of the trial judge and the district attorney during his trial, which questions were considered by the California Supreme Court on appeal, it is patent that he has received a full and complete hearing on the factual questions in the state court.

Further, it is apparent from the opinion of the District Court that he reviewed the state records of that trial, which were lodged with him, in accordance with the mandate of this court in Chavez v. Dickson, 280 F.2d 727, 733.

CONCLUSION

Appellee respectfully submits that the record in this matter supports the finding of the District Court and discloses that appellant was accorded due process of law in the state courts.

It is therefore submitted that the District Judge neither erred in denying said petition nor in denying appellant counsel.

It is therefore submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

IN AND FOR THE NINTH CIRCUIT

HAROLD JACKSON, Appellant, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Appellee	No. 19052

CERTIFICATE OF ATTORNEY FOR APPELLEE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DORIS H. MAIER
Assistant Attorney General